IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

In Re:	§	
	§	
BOBBY RAY SCHUMANN,	§	CASE NO. 03-50398-RLJ-7
	§	
Debtor	§	

KENNETH B. ROBERTS, INDIVIDUALLY AND AS TRUSTEE FOR THE ROBERTS REVOCABLE LIVING TRUST,	§	
	§	
Plaintiff	§	
	§	
VS.	§	ADVERSARY NO. 03-5047
	§	
BOBBY RAY SCHUMANN	§	
	§	
Defendant	§	

MEMORANDUM OPINION

Preliminary Statement

On August 2, 2004, the Plaintiff, Kenneth B. Roberts, individually, and as Trustee for the Roberts Revocable Living Trust, filed his motion for summary judgment on his claims against the Defendant, Bobby Ray Schumann. The Plaintiff contends that collateral estoppel governs this case and that the Court should deny the debtor's discharge, pursuant to 11 U.S.C. § 727(a)(2), because of this Court's prior ruling in related adversary number 03-5055. A copy of the Court's Memorandum Opinion in adversary number 03-5055 is attached hereto. There, this Court held that Schumann's pre-petition transfer of property to his wife was actually and/or constructively fraudulent under section 548 of the Bankruptcy Code. The Plaintiff argues that because section

727(a)(2) contains similar language and requirements as section 548(a)(1)(A), this Court's ruling in the related adversary precludes the debtor from relitigating the same issues in this case. Defendant filed his response in opposition to the motion on October 27, 2004. The Court held a hearing on the motion on October 25, 2004 and Plaintiff filed a reply brief, pursuant to court instruction, on November 12, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986); *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 255. A factual dispute bars summary judgment when the disputed fact is determinative under governing law of the issue before the court. *Id.* at 250. The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The Defendant filed Chapter 7 bankruptcy on April 1, 2003. Under 11 U.S.C. 727(a)(2), the court shall grant the debtor a discharge unless:

> (2) the debtor, with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> > (A) property of the debtor, within one year before the date of the filing of the petition.

The parties contest only whether Bobby Ray Schumann "transferred" the property within one year prior to the bankruptcy filing. Initially, the Court notes that the "question of when a transfer is 'made' is a question of federal law." *In re Roosevelt*, 87 F.3d 311, 316 (9th Cir. 1996), as amended, 98 F.3d 1169.

Discussion

Collateral estoppel "promotes the interests of judicial economy by treating specific issues of fact or law that are validly and necessarily determined between two parties as final and conclusive." *United States v. Shanbaum*, 10 F.3d 305, 311 (5th Cir. 1994). Collateral estoppel is appropriate if four requirements are met: 1) the issue under consideration in a subsequent action must be identical to the issue litigated in a prior action; 2) the issue must have been fully and vigorously litigated in the prior action; 3) the issue must have been necessary to support the judgment in the prior case; and 4) there must be no special circumstance that would render preclusion inappropriate or unfair. *Id.*; *Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1136 (5th Cir. 1991); *In re Rand Energy Co.*, 256 B.R. 712, 715 (Bankr. N.D. Tex. 2000).

In the previous adversary between the parties, this Court held that "because of the clear 'badges of fraud' in this case, the court finds that, as a matter of law, Bobby Ray Schumann acted

with the requisite intent to hinder, delay, or defraud his creditors, both on April 8, 2002, and February 3, 2003." Memorandum Opinion p. 17. The opinion, however, limited its finding to section 548. Although the language in the two sections is similar, it is not identical. Section 548(d)(1) defines "transfer" in the following manner:

> For the purpose of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 548(d)(1). Unlike its purported counterpart, however, section 727(a)(2) does not define "transfer." Rather, the Court must look to the general definition, contained in section 101:

> "transfer" means every mode, direct, or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

11 U.S.C. § 101(54). Simple statutory construction leads to the conclusion that Congress did not intend that this Court interpret section 727 in the same manner as it would section 548. Had Congress desired to give these two provisions identical treatment as to the issue of the treatment of the term "transfer," it merely had to repeat its previous definition in section 548 in section 727. Congress failed to do so, however, and instead left the decision to the courts. *Roosevelt*, 87 F.3d at 316.

The deference shown by Congress resulted in split rulings between circuit courts concerning whether a debtor should be denied a discharge if the transfer itself was made before, but the record of the transfer was made within, the statutory period. 6 COLLIER ON BANKRUPTCY

¶ 727.02[2][c] (15th ed. rev. 2004). One theory, adopted by the Third Circuit, holds that the date of recordation, rather than the date of the deed, is the proper point to measure whether the transfer occurred within one year prior to bankruptcy. *Dean Witter Reynolds, Inc. v. MacQuown* (*In re MacQuown*) 717 F.2d 859 (3d Cir. 1983). The second theory, urged by Defendant, "deems a transfer 'made' for the purposes of § 727(a)(2) once it is effective between the parties to the transfer, whether or not it is valid against bona fide purchasers." *Roosevelt*, 87 F.3d at 318. The Fifth Circuit has not yet addressed the issue.

Despite Plaintiff's and Defendant's urging that this Court enter this academic dispute, the two approaches are not irreconcilable. First, as Collier's states, the Ninth Circuit approach "recognizes that the recording of the transfer may not always be in the debtor's control, and gives effect to the often-expressed preference for strictly construing objections to discharge in favor of granting relief to the debtor." 6 COLLIER ON BANKRUPTCY at ¶ 727.02[2][c]. Thus, where recordation is not within the debtor's control, this approach is favorable because it allows the court to accommodate a debtor in this situation. But where, for example, the debtor conveys property to his wife, family member, etc., and the delay, for whatever purpose, in recording is of his own doing, the Third Circuit approach is proper. That approach prevents "a debtor from concealing the transfer by delaying recordation to avoid the operation of section 727(a)(2)." Id.

Using the aforementioned analysis, the Court turns to the facts at bar. Though the use of the term "transfer" may differ from section 548 to section 727, the impact on this case is the same. On December 31, 1986, Bobby Ray Schumann and his wife, Donniss Schumann, acquired a tract of real estate in Elbert County, Colorado. Memorandum Opinion at 4. The Schumanns acquired

the property as joint tenants. *Id.* Sometime thereafter, Bobby Ray Schumann hired a survey company to divide the property into four tracts. *Id.* On December 25, 2000, Defendant sold one of the four tracts to Diana Herrick and Evelyn Yorty for $545,000. *Id.* at 5-6. On February 2, 2001, Defendant sold another tract to Robert Shriner for $138,000. *Id.* at 6. The remaining tracts consisted of 100 acres. *Id.* On December 22, 2000, Defendant conveyed his interest in the 100 acres to his wife. *Id.* Defendant did not record this deed, however, for over two years, until April 8, 2002. *Id.* On February 3, 2003, a correction deed was recorded concerning the 100 acres. *Id.*

Defendant has not, in this adversary or the previous litigation, submitted evidence shifting blame for the delay in recording from himself to another party. The only evidence submitted in the previous litigation concerned testimony taken by deposition of Bobby Ray Schumann in that matter. Mr. Schumann testified:

> Q. When you did record it, why did you record it when you did?
>
> A. Well, the wife probably didn't know this, but at the time I received the notice of the suit of Mr. Roberts and I called my son, who was redoing all the legal papers and things for me, and he looked at it and he said did you ever record that?
>
> Q. You said no, you hadn't so—
>
> A. He said you better get it done.
>
> Q. Okay. So in reality, the reason why you recorded the deed when you did was because of the Roberts lawsuit, correct?
>
> A. That's correct.

Memorandum Opinion p. 14. Even in a light most favorable to the Defendant, without further evidence, the court is left with nothing but an unexplained two-year gap from transfer to recordation. As the blame falls squarely on the Defendant for the delay, the Third Circuit approach is most applicable, and the transfer of ownership in the property "should not be considered complete until it is so far perfected that no bona fide purchaser from the debtor-transferor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transfer[ee] therein." *MacQuown*, 717 F.2d at 863 n.3 (quoting 4 COLLIER ON BANKRUPTCY ¶ 727.02[2] at 727-7 n. 3 (15th ed. 1983).

Defendant purportedly deeded the property to his wife on December 22, 2000. The deed was recorded, and thus perfected against bona fide purchasers, on April 8, 2002. As such, the April 8, 2002 is the only date at issue in this case. Because Defendant filed bankruptcy on April 1, 2003, the actual transfer at issue occurred within one year of his bankruptcy filing. *See* 11 U.S.C. § 727(a)(2).

In light of these facts, collateral estoppel is appropriate for the following reasons. First, the issue under consideration, the definition of transfer for the purpose of § 548 and § 727, is identical to an issue litigated in the previous law suit before the court. *See MacQuown*, 717 F.2d at 863; *In re Roy*, 42 B.R. 102, 104 (Bankr. S.D. Fla. 1984) ("Although this provision [11 U.S.C. § 548(d)(1)] is not explicitly made applicable to § 727(a)(2), there is no good reason why it should not be adopted by analogy.") Second, the issue in the prior action was fully and vigorously litigated. Plaintiffs there, the Chapter 7 Trustee and Mr. Roberts, filed a summary judgment motion. Defendants, Mr. and Mrs. Schumann, filed their respective responses and a hearing was

held on the matter on April 22, 2004. Clearly, each side participated fully in the prior litigation. Third, the issue at bar was necessary to support the judgment in the prior case. In that case, this Court held that "[t]he court, therefore, looks to the time the conveyance was perfected under state law" to determine when the transfer actually occurred for section 548. A finding that the Defendant recorded the deed within the one year period was necessary to the Court's holding that he transferred property with the requisite intent. Clearly, the issue was central to this Court's holding. Fourth, Defendant has yet to proffer any reason, apart from his argument regarding the definition of "transfer," discussed *supra*, why collateral estoppel is inappropriate or unfair. The Court agrees with Defendant that Congress' use of the term "transfer" in the two sections, 548 and 727, is not the same. As a practical matter, however, the result is the same. Accordingly, the Court finds that, as a matter of law, Bobby Ray Schumann transferred property with the requisite intent to hinder, delay, or defraud his creditors, within one year prior to his filing bankruptcy.

Continuing Concealment

Although Collier's mentions the doctrine of continuing concealment in connection with the above dispute, neither the Third nor the Ninth Circuit addressed this doctrine in their dispute over the date that a transfer is effective. The court recognizes, however, that the doctrine of continuing concealment is a viable doctrine in the Fifth Circuit. *See In re Womble*, 289 B.R. 836, 845 (Bankr. N.D. Tex. 2003); *Thibodeaux v. Oliver* (*In re Oliver*), 819 F.2d 550, 554-55 (5th Cir. 1987). Continuing concealment is "the concealment of an interest in an asset that continues, with the requisite intent, into the year before bankruptcy constitutes a form of concealment which occurs within the year before the bankruptcy and, therefore, . . . within the reach of section 727(a)(2)."

Oliver, 819 F.2d at 555. Continued use of the property after transfer is sufficient to constitute concealment. *Womble*, 289 B.R. at 845-46. A continuing concealment further justifies the adoption of the latter date, i.e., the date of recordation as the transfer date. While the issue of a continuing concealment is not specifically before the Court, the Court notes that Defendant retained the use and other benefits of the property even though it was conveyed to his wife. *See* Memorandum Opinion at 16. The only notice to the world of the transfer is the recordation on April 8, 2002.

Conclusion

Based on the foregoing, Plaintiff is entitled to summary judgment against Defendant on his claim for denial of discharge pursuant to 11 U.S.C. § 727(a)(2).

SIGNED January 3, 2005.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

IN RE:	§	
	§	
BOBBY RAY SCHUMANN,	§	CASE NO. 03-50398-RLJ-7
	§	
DEBTOR	§	

MYRTLE MCDONALD, CHAPTER 7 TRUSTEE FOR THE ESTATE OF BOBBY RAY SCHUMANN, AND KENNETH B. ROBERTS, INDIVIDUALLY AND AS TRUSTEE FOR THE ROBERTS REVOCABLE LIVING TRUST,	§	
	§	
Plaintiffs	§	
	§	
VS.	§	ADVERSARY NO. 03-5055
	§	
BOBBY RAY SCHUMANN AND DONNISS C. SCHUMANN,	§	
	§	
Defendants	§	

MEMORANDUM OPINION

Preliminary Statement

On March 4, 2004, the plaintiffs, Myrtle McDonald, Chapter 7 Trustee, and Kenneth B. Roberts, individually, and as Trustee for the Roberts Revocable Living Trust (collectively the "Plaintiffs"), filed their motion for summary judgment on their claims against the defendants, Bobby Ray and Donniss C. Schumann (collectively the "Defendants"). The Plaintiffs contend that a certain pre-petition transfer of real property from Bobby Ray Schumann to Donniss C. Schumann was actually and/or constructively fraudulent under either bankruptcy or non-bankruptcy law. The

Defendants filed their respective responses in opposition to the motion on March 17 and 25, 2004. The parties made further arguments through responses and replies filed with the court. The court held a hearing on the motion on April 22, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250 (1986); *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Anderson*, 477 U.S. at 255. A factual dispute bars summary judgment when the disputed fact is determinative under governing law of the issue before the court. *Id.* at 250. The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. *Celotex*, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986).

The Defendants filed Chapter 7 bankruptcy on April 1, 2003. Under 11 U.S.C. § 548(a)(1), the trustee may avoid any transfer of a property interest of the debtor made within one year of filing the bankruptcy petition if either (1) the debtor made such transfer with the actual intent to hinder, delay, or defraud creditors – , *i.e.*, actual fraud, or (2) the debtor received less

than reasonably equivalent value in exchange for such transfer and was insolvent or became insolvent as a result thereof –, *i.e.*, constructive fraud. *See In re GWI PCS 1 Inc.*, 230 F.3d 788, 805 (5th Cir. 2000); *Gaudet v. Babbin (In re Zedda)*, 103 F.3d 1195, 1201 (5th Cir. 1997). The parties contest only whether defendant Bobby Ray Schumann acted with the requisite intent in making the transfer and whether he was insolvent at the time of the transfer.

Evidentiary Matters

Defendant Donniss Schumann objected to the Plaintiffs' thirty-five evidentiary exhibits on the ground that the evidence had not been properly authenticated by supporting affidavits. Plaintiffs filed a reply to the evidentiary objections and attached the affidavit of Raul Suazo, which purports to authenticate each exhibit based on his personal knowledge. *See Fenje v. Feld*, 301 F.Supp. 2d. 781, 811 (N.D. Ill. 2003) ("There is no rule preventing a party moving for summary judgment from responding to evidentiary objections in its reply or even from providing additional foundation materials with the reply.") (citing *Elghanmi v. Franklin College of Indiana, Inc.*, 2000 WL 1707934 *1 (S.D. Ind. Oct.2, 2000)). Defendants made no objection to the sufficiency of this affidavit, either in writing or at oral argument. *See Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 504 (5th Cir. 1999) ("The admissibility of evidence [on a motion for summary judgment] is subject to the same standards and rules that govern the admissibility of evidence at trial"); *United States v. Monkey*, 725 F.2d 1007, 1011 n.4 (5th Cir. 1984) (discussing that a failure to object to the method of authentication of documentary evidence waives the objection). *See also, BGHA, L.L.C. v. City of Universal City, Tex.*, 340 F.3d 295, 299 (5th Cir. 2003) (discussing that, in a motion for summary judgment, a defect in the substance

of an affidavit is waived if not brought to the trial court's attention by proper objection.) Accordingly, the exhibits are admitted as proper summary judgment evidence.

Undisputed Facts

On December 31, 1986, Bobby Ray Schumann and his wife, Donniss Schumann, acquired a tract of real estate in Elbert County, Colorado. Pls.' Ex. A. The Schumanns acquired the property as joint tenants. *Id.* Sometime thereafter, Bobby Ray Schumann hired a survey company to divide the property into four tracts. Pls.' Ex. B. This property becomes especially relevant several years later.

(1) The Guaranty

On July 21, 1998, First Commonwealth Mortgage Trust ("FCMT") extended a loan to Texas T-Bone Express Corporation ("T-Bone") in the amount of $400,000. Pls.' Ex. K. The loan was secured by real property owned by T-Bone. *Id.* On July 27, 2000, FCMT agreed to extend the terms of the loan and increase the principal amount to $900,000. *Id.* The additional amount was also secured by real property owned by T-Bone. *Id.* That same day, Kenneth Roberts, Timothy Jackson, Steve Denny, and Bobby Ray Schumann ("Guarantors") each signed guaranties of the loan. *Id.* Thereafter, T-Bone defaulted on the loan and FCMT exercised its right of acceleration against both T-Bone and the Guarantors. *Id.* On March 19, 2001, the loan was amended and renewed in the principal sum of $988,000. *Id.* The guaranty agreements for each of the Guarantors were amended to recognize the additional debt. *Id.* T-Bone again defaulted on the loan and FCMT exercised its right of acceleration against both T-Bone and the Guarantors. *Id.* On September 4, 2001, FCMT sent demand letters to T-Bone and the Guarantors demanding

payment of the unpaid balance of $988,000, plus interest. *Id.* On the same day, September 4, 2001, FCMT also filed suit in state court against T-Bone and the Guarantors for amounts due under the loan. Pls.' Exs. K and L. T-Bone has failed to pay any amounts on the loan. *Id.*

On February 11, 2002, FCMT moved for default judgment in the state court action against Bobby Ray Schumann. Pls.' Ex. L. The motion was based on Bobby Ray Schumann's "limited guaranty" in the amount of $400,000, plus interest, attorney's fees, and costs.[1] *Id.* On March 1, 2002, a default judgment was rendered against Bobby Ray Schumann for $435,600, composed of the principal amount of $400,000, plus $35,600 for attorney's fees and other costs. Pls.' Ex. M. Also, on March 1, 2002, Kenneth Roberts, one of the Guarantors, filed his answer, which included a cross-claim against Bobby Ray Schumann. Pls.' Ex. N. In the cross-claim, Kenneth Roberts alleges that to the extent he liable under the loan, Bobby Ray Schumann is also jointly and severally liable on the basis of contribution. *Id.* The cross-claim was served on Schumann on March 27, 2002. Pls.' Ex. O. On August 9, 2002, Kenneth Roberts secured summary judgment against Bobby Ray Schumann on the cross-claim in the amount of $400,000 plus attorney's fees and other costs. Pls.' Ex. P.

(2) Elbert County Real Estate Transactions

As discussed above, Bobby Ray Schumann divided the Elbert County into four tracts. Pls.' Exs. A, B, S, T, U, V. On December 25, 2000, Defendants sold one of the four tracts to

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[1] Plaintiffs contend that Bobby Ray Schumann's guaranty agreement was unlimited but that in the state court litigation it was treated as limited in the amount of $400,000. Whether or not such agreement was unlimited as to amount has no bearing on the analysis of this motion for summary judgment. Regardless of the potential liability under the agreement, the court instead focuses on the actual judgment procured by FCMT and Kenneth Roberts.

Diana Herrick and Evelyn Yorty for $545,000 ("Tract One"). On February 2, 2001, Defendants sold another tract to Robert Shriner for $138,000 ("Tract Three"). The tracts at issue in this adversary are the other two tracts consisting of 100 acres (the "100 acres" or separately referred to as "Tract Two" and "Tract Four").

On April 8, 2002, Bobby Ray Schumann recorded a deed conveying his interest in the 100 acres to his wife, Donniss Schumann ("Original Deed"). The deed purports to have been executed on December 22, 2000. The deed recites consideration for the conveyance as, "the payment of one dollars ($1.00), my love and affection for forty nine years of marital bliss." Pls.' Ex. U. On February 3, 2003, a correction deed was recorded concerning the 100 acres ("Correction Deed"). The Correction Deed purports to have been signed on January 3, 2003, and states as follows: "[t]his deed is necessary to correct the legal description and notary acknowledgment on deed recorded April 8, 2002 in Book 627 at Page 303." *Id.* That same day, February 3, 2003, a third deed was recorded under which Donniss Schumann conveyed Tract Four, consisting of forty acres, to Kimberly Pray in return for $100,000.

Discussion

The Plaintiffs attack the conveyance of Bobby Ray Schumann's interest in Tracts Two and Four (the 100 acres) to his wife, Donniss Schumann, as actually and/or constructively fraudulent under both bankruptcy and non-bankruptcy law. The court first addresses the date the transfer is deemed to have occurred.

(1) Timing Issues

The Original Deed purports to have been executed on December 22, 2000, but was not perfected by recordation until April 8, 2002. The Correction Deed purports to have been executed on January 3, 2003, and bears a recording date of February 3, 2003. Bobby Ray Schumann's affidavit sets forth his good faith reasons, as of December 22, 2000, for the transfer. He also states that he was not insolvent on December 22, 2000. This date is not relevant, however, as the court looks to the date the transfer was perfected.[2]

Section 548(d)(1) (11 U.S.C.) states:

> For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee . . . .

For purposes of fraudulent transfer analysis of interests in real property, a transfer is deemed to have been made when the transfer is perfected as to a subsequent bona fide purchaser from the debtor. *See Sandoz v. Bennett (In re Emerald Oil)*, 807 F.2d 1235, 1237 (5th Cir. 1987); *Taylor v. Riverside-Franklin Props., Inc. (In re Taylor)*, 228 B.R. 491, 498 (Bankr. M.D. Ga. 1998) ("Section 548(d) is the operative section for determining the time a transfer for purposes of section 548(a) is 'made.'"); 5 Collier on Bankruptcy ¶ 548.02[2] (15th ed. rev. 2003) (discussing that the requisite intent to be considered is the intent of the debtor at the time the transfer is perfected versus alleged execution date); 3 W. Norton, Bankruptcy Law and Practice § 58:10

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[2]As will be discussed, *infra*, even if the court were to consider Schumann's reasons in December of 2000 for transferring the property, the self-serving affidavit testimony would not be sufficient to preclude this court from holding, as a matter of law, that the transfer was made with actual fraud. *See Hinsley v Boudloche (In re Hinsley)*, 201 F.3d 638, 643 (5th Cir. 2000).

(2003) ("Equally important, all elements of a fraudulent conveyance for § 548 purposes are measured not when the transaction actually took place, but when it was deemed to have been perfected."). The court, therefore, looks to the time the conveyance was perfected under state law. *See Emerald Oil*, F.2d at 1237 (5th Cir. 1987) ("For purposes of § 548(d)(1), state law on time of perfection controls.").

The Colorado statute governing priority and perfection is a race-notice recording statute. Colorado Revised Statutes Ann. § 38-35-109. Accordingly, in Colorado, an unrecorded deed is not valid against a bona fide purchaser without notice. *Plew v. Colorado Lumber Prods.*, 481 P.2d 127, 130-31 (Colo. Ct. App. 1970). In this case, two deeds were recorded, the latter one (the Correction Deed) because of the possible insufficient legal description of the property contained in the Original Deed. If the description contained in the Original Deed was in fact insufficient, the court must look to the time at which the Correction Deed was perfected, February 3, 2003. *See Harrison v. Everett*, 308 P.2d 216, 219 (Colo. 1957) ("A description is sufficient when from it the property can be identified"); *Derham v. Hill*, 142 P. 181, 182-3 (Colo. 1914) (discussing the ineffectiveness of a deed that contains an insufficient legal description of the property). However, if the description contained in the Original Deed was sufficient and therefore effected a valid conveyance, the proper date is April 8, 2002. *See Cohen v. Bellamy (In re Shannis)*, 229 B.R. 234, 237 (Bankr. M.D. Fla. 1999) (discussing that the analysis under § 548 focuses on the date on which the deed was recorded and perfection otherwise effective under state law). The court looks at both dates, April 8, 2002 and February 3, 2003, in considering whether the transfer was constructively or actually fraudulent.

(2) Constructive Fraud

A transfer is avoidable by the trustee under 11 U.S.C. § 548(a)(2) if the debtor received less than equivalent value in exchange for the transfer, and the debtor was insolvent at the date of the transfer or became insolvent as a result thereof. *See Bustamante v. Johnson (In re McConnell),* 934 F.2d 662, 664 (5th Cir. 1991). The Original Deed recites that the transfer of Tract Two and Tract Four was made in return for "the payment of one dollars ($1.00), my love and affection for forty nine years of marital bliss." It is undisputed that Bobby Ray Schumann failed to receive "reasonably equivalent value" in return for the acreage. *See Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 644 (5th Cir. 2000) ("The value of consideration given for a transfer alleged in fraud of creditors is determined from the standpoint of creditors."); *Henkel v. Green (In re Green)*, 268 B.R. 628, 651 (Bankr. M.D. Fla. 2001) ("Love and affection are not adequate consideration and will not protect transfers from the Trustee.").

The issue contested by the parties is whether Bobby Ray Schumann was insolvent at the time of the transfer. Under 11 U.S.C. § 101(32)(A), an individual is insolvent when the sum of the individual's debts is greater than all the individual's property, at a fair valuation, exclusive of exempt property and the property that is allegedly fraudulently transferred. "Courts refer to this test as a balance sheet test, and engage in the 'fair valuation' of the debts and property shown on the debtor's balance sheet." *Sherman v. FSC Realty, L.L.C. (In re Brentwood Lexford Partners, L.L.C.)*, 292 B.R. 255, 268 (Bankr. N.D. Tex. 2003).

(a) April 8, 2002

On April 8, 2002, Bobby Ray Schumann had a total of $147,714.66 in assets with only $16,514.66 of those being non-exempt. Pls.' Ex. DD. The parties' dispute lies in the calculation of Bobby Ray Schumann's debts on April 8, 2002, which turns on the amount attributable to Bobby Ray Schumann's guaranty of the FCMT debt.

A debt means liability on a "claim." 11 U.S.C. § 101(12). A "claim" includes the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable secured, or unsecured. 11 U.S.C. § 101(5)(A). Contingent liabilities, like a guaranty agreement, must be discounted by the probability that the contingency will materialize. *In re WRT Energy Corp.*, 282 B.R. 343, 399 (Bankr. W.D. La. 2001) ("Under the Bankruptcy Code, for purposes of determining solvency, contingent liabilities should not be considered at face value, but rather should be discounted by the probability that the contingency will materialize"). *See also Federal Deposit Ins. Corp. v. Bell,* 106 F.3d 258, 264 (8th Cir. 1997); *Covey v. Commercial Nat'l Bank of Peoria,* 960 F.2d 657, 659-60 (7th Cir. 1992); *Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.),* 904 F.2d 588, 594 (11th Cir. 1990); *In re Xonics Photochemical, Inc.,* 841 F.2d 198, 200 (7th Cir. 1988). "[T]he fair value of a contingent liability is properly determined by multiplying total debt guaranteed by the probability that the debtor would be required to make good on the guarantee." *WRT Energy Corp.*, 282 B.R. at 400 (citing *Covey,* 960 F.2d at 659-60). "[T]his evaluation must be made as of the date of the valuation and without the benefit of hindsight." *Id.*

Beginning with the original guaranty of the T-Bone loan, Bobby Ray Schumann incurred a debt resulting from the possibility that payment might be demanded based on such guaranty. This court need not attempt to articulate a specific sum attributable to this potential debt, because, in fact, this amount was already liquidated on March 1, 2002, when FCMT reduced this claim to a sum certain in the form of a default judgment against Bobby Ray Schumann in the amount of $435,600. While Bobby Ray Schumann may have been able to claim that his guaranty agreement, when originally signed, would unlikely be enforced, on March 1, 2002, his liability on the loan was liquidated and matured. Additionally, Kenneth Roberts asserted a related claim against Bobby Ray Schumann in the form of a cross-claim in his answer filed March 1, 2002, and subsequently served on Bobby Ray Schumann on March 27, 2002. Although the claim had not been reduced to judgment by April 8, 2002, the mere assertion of the legal claim in the pleading was enough to create a contingent claim against Schumann. No evidence has been presented to show that these claims were not pending against Bobby Ray Schumann through April 8, 2002.

Defendants point to a mediation agreement, dated April 11, 2002, as evidence that Bobby Ray Schumann was not liable on the guaranty on April 8, 2002. This agreement pertains to FCMT's claims against T-Bone and the Guarantors of the T-Bone loan, as well as the cross-claims among the Guarantors. Generally speaking, in this agreement, the parties agreed to dispose of all such claims in return for payment by Kenneth Roberts to FCMT and the disposition of certain collateral for the loan.

Defendants claim that this agreement somehow created a "gap period" during which Bobby Ray Schumann was released from liability to FCMT, and was not yet liable to Kenneth

Roberts or any of the other Guarantors. The agreement was entered into on April 11, 2002; it has no bearing on the April 8, 2002 insolvency analysis.[3] Plus, Schumann is not reflected as a party to the agreement. *See* Defs.' Ex. D. On April 8, 2002, Bobby Ray Schumann was manifestly insolvent as his non-exempt assets, valued at $16,514.66, paled in comparison to FCMT's $435,000 judgment, as well as the pending claim of Kenneth Roberts.

(b) February 3, 2003

The date of the Correction Deed, February 3, 2003, is less than sixty days before the Defendants' bankruptcy filing, April 1, 2003. Defendants submitted no evidence to dispute Bobby Ray Schumann's insolvency on February 3, 2003. In fact, in response to Plaintiffs' request for admissions, Bobby Ray Schumann admits that he was insolvent on February 3, 2003.[4] Pls.' Ex. DD. *See also American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991) (discussing binding effect of such an admission). As additional evidence of his insolvency on February 3, 2003, Bobby Ray Schumann's bankruptcy schedules reflect that he was insolvent upon filing his petition for bankruptcy on April 1, 2003, and that he was likewise insolvent less than sixty days before on February 3, 2003, because no significant transactions had occurred between these two dates to change his financial position. *See Weaver v. Kellogg*, 216 B.R. 563, 576

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[3] Defendants also point to an email, dated May 27, 2003, in furtherance of their attempt to show that on April 8, 2003, Bobby Ray Schumann was not indebted to FCMT or Kenneth Roberts. This email has no bearing on Bobby Ray Schumann's solvency on April 8, 2003 because any possible effect the email could have had on his solvency was after April 8, 2003. Additionally, regardless of the timing, the court finds that the email does not purport to have any effect on Bobby Ray Schumann's insolvency.

[4] However, because this request was only made on Bobby Ray Schumann, the admission does not bind his co-defendant, Donniss Schumann. *See Becerra v. Asher*, 921 F. Supp. 1538, 1544 (S.D. Tex. 1996), *aff'd on other grounds*, 105 F.3d 1042 (5th Cir. 1997).

(S.D. Tex. 1997) ("Plaintiff may be able to prove insolvency at earlier periods through the process of "retrojection," *i.e.* 'showing that the debtor was insolvent a reasonable time. . . after the transfer and that the debtor's financial condition did not materially change during the intervening period.'") (quoting David G. Epstein, et al., Bankruptcy, § 6-49 (1992)). *See also, Mancuso v. T. Ishida USA, Inc. (In re Sullivan),* 161 B.R. 776, 784 (Bankr. N.D. Tex. 1993) (accepting evidence of insolvency six months before and six months after the transaction in question in order to show insolvency at the time of the transaction).

Bobby Ray Schumann's schedules show that on May 1, 2003, he held $751 in non-exempt assets. He listed his total known unsecured debts at $750,000, consisting of a $300,000 debt to T-Bone under a guaranty and Kenneth Robert's $450,000 judgment. His financial condition did not materially change in the two months leading up to bankruptcy. The Schumanns' American State Bank account shows no unusual transactions during the two months leading up to his bankruptcy petition; the ending monthly balances did not vary more than $200. Pls.' Ex. EE. *Id.* The May 1, 2003 schedules reflect that Bobby Ray Schumann was retired, and he and his wife's income consisted of their monthly social security benefits of $1,368 and $538, respectively. He listed $2,201 as his total monthly expenses. His schedules show that in the years 2001, 2002, and up to May 1, 2003, the Schumann's received a total of $127,295 in income. This includes a $95,000 capital gain from the sale of real property in 2001. Pls.' Ex. Y. After accounting for living expenses of $2,201 a month for 29 months, this leaves, at most, $63,466. Even if the court were to include this $63,466 as part of Bobby Ray Schumann's net worth, it would not be enough

to even cover the $435,600 FCMT judgment for purposes of insolvency.[5] Because of the Schumann's lack of income in the months leading up to bankruptcy and the absence of any material transactions during this time period, no fact question exists concerning Bobby Ray Schumann's insolvency on February 3, 2003.

(3) Actual Intent to Hinder, Delay, or Defraud Creditors

The court also considers whether Bobby Ray Schumann transferred the 100 acres with the actual intent to hinder, delay, or defraud creditors. First, in Bobby Ray Schumann's deposition taken in this matter, he admitted that he recorded the Original Deed on April 8, 2002, in response to Kenneth Robert's suit, which, as stated, was initiated March 1, 2002, and served on Schumann on March 27, 2002. Schumann testified as follows:

> Q. When you did record it, why did you record it when you did?
>
> A. Well, the wife probably didn't know this, but at the time I received the notice of the suit of Mr. Roberts and I called my son, Mike, who was redoing all the legal papers and things for me, and he looked at it and he said did you ever record that?
>
> Q. You said no, you hadn't so –
>
> A. He said you better get it done.
>
> Q. Okay. So in reality, the reason why you recorded the deed when you did was because of the Roberts lawsuit, correct?
>
> A. That's correct.

Pls.' Ex. B.

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[5] Even if the court were to include every dollar received as income during this time period in Schumann's net worth, the FCMT judgment would still well exceed his assets.

Next, actual intent may be inferred from the actions of the debtor and may be proven by circumstantial evidence. *Pavy v. Chastant (In re Chastant)*, 873 F.2d at 89, 91 (5th Cir. 1989). There must be extrinsic evidence of the statutorily violative intent, whether it is to hinder, to delay, or to defraud creditors. *See United States Trustee v. Robb,* 1999 WL 324655 at *1 (N.D. Tex.1999). Recognizing that actual intent is difficult to prove because the debtor will rarely admit to fraudulent intentions, the courts have outlined several so-called badges of fraud that may prove an actual intent to defraud. *See Chastant,* 873 F.2d at 91. The Fifth Circuit, in *Chastant*, listed the following general badges of fraud:

> (1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry.

Id. One of these factors may be sufficient to find actual fraudulent intent; an accumulation of several such factors strongly indicates that the debtor possessed the requisite intent. *See FDIC v. Sullivan (In re Sullivan),* 204 B.R. at 940; *Cullen Center Bank & Trust v. Lightfoot (In re Lightfoot),* 152 B.R. 141, 148 (Bankr. S.D. Tex. 1993).

The circumstantial evidence regarding Bobby Ray Schumann's transfer of the property smacks of fraud during both time periods in question. First, Bobby Ray Schumann received no consideration in return for the conveyance of his interest in the 100 acres. Second, the husband/wife relationship of the transaction supports a finding of fraud, especially in the context of a husband transferring property to a non-debtor spouse during the time leading up to bankruptcy.

Third, the evidence supports the proposition that Bobby Ray Schumann retained the use and other benefits of the property as the property was fully owned by his spouse after the April 8, 2002 transfer. Since defendant Donniss Schumann sold Tract Four on the same day Bobby Ray Schumann conveyed his interest in Tract Four to his wife February 3, 2003, this "badge of fraud" is inapplicable as to Tract Four for the latter time period. Fourth, Bobby Ray Schumann's financial condition before and after the transaction is highly suspect during both of the time frames in question. Defendants' source of income during 2001 and 2002 was almost entirely based on their farming and ranching business. Pls.' Exs. X and Y. During both years, Defendants failed to make a profit. *Id.* Regardless of what date is considered, April 8, 2002 or February 3, 2003, Defendants' business was not producing any demonstrated cash flow. Additionally, on February 3, 2003, Bobby Ray Schumann was on the verge of filing for bankruptcy, as evidenced by his filing less than two months later. Fifth, the Defendants' transactions indicate a fraudulent intent. Their business was operating at a deficit. To compound this problem, on April 8, 2002, Bobby Ray Schumann was knee-deep in litigation regarding this guaranty agreement. On February 3, 2003, he was still being pursued by FCMT on the $435,600 judgment and by Roberts on the $400,000 judgment. The litigation, the business losses, and liquidation of the Elbert County property all support the inference that Defendants were scrambling to stay afloat and otherwise dodge the pending FCMT and Roberts judgments.

Virtually every "badge of fraud" is present in this case. The only evidence offered by Defendants to refute a finding of fraud is the affidavit of Bobby Ray Schumann. This affidavit includes the following statement:

> I did not give my one-half interest in the 100 acres to my wife to defraud creditors. I had no creditors, in my view, in December 2000. Women live longer than men. My wife is in better health than me. I thought she needed to feel more secure about the future. My son was being buried. It was her birthday. I was financially flush. The gift was a gesture to make her feel better.

Defs.' Ex. A. This affidavit does not preclude the granting of summary judgment in this case. First, it addresses Bobby Ray Schumann's state of mind in December of 2000. As discussed, *supra*, the proper analysis focuses on when the transfer was perfected. Even if the court were to find that the statements made in this affidavit related to a relevant point in time for purposes of 11 U.S.C. § 548, Schumann's explanation does not prevent summary judgment. The court may properly decide, as a matter of law, whether a debtor transferred property with the requisite intent to defraud. *Hinsley v. Boudloche (In re Hinsley)*, 201 F.3d 638, 643 (5th Cir. 2000) (quoting *BMG Music v. Martinez,* 74 F.3d 87, 90 (5th Cir. 1996)). "A party's self-serving and unsupported claim that [he] lacked the requisite intent is not sufficient to defeat summary judgment where the evidence otherwise supports a finding of fraud." *Id.* (holding that affidavit from debtor and debtor's husband which denied that the purpose of a similar transfer was to defraud creditors, and instead, made on account of marital troubles did not preclude court from entering summary judgment based upon the "badges of fraud"). Because of the clear "badges of fraud" in this case, the court finds that, as a matter of law, Bobby Ray Schumann acted with the requisite intent to hinder, delay, or defraud his creditors, both on April 8, 2002 and February 3, 2003.

Conclusion

Based on the foregoing, Plaintiffs are entitled to summary judgment against Defendants on their claims for actual and constructive fraud pursuant to 11 U.S.C. § 548. Under 11 U.S.C. §

550(a), the trustee is entitled to recover, from the immediate transferee of the fraudulent transfer, either the actual property transferred or the value attributable to the particular property for the benefit of the estate. Donniss Schumann transferred Tract Four on February 3, 2003 in return for $100,000. Bobby Ray Schumann's one-half interest in Tract Four translates to $50,000 of the proceeds from that sale. Judgment shall issue against Donniss Schumann in the amount of $50,000. Donniss Schumann continues to hold title to Tract Two. As the Trustee is entitled to avoid the transfer of Bobby Ray Schumann's one-half interest in this tract, the court will order Donniss Schumann to transfer title of this one-half interest to the Trustee for the benefit of the estate pursuant to 11 U.S.C. § 550(a).

The court is given discretion to award the Trustee prejudgment interest in a fraudulent conveyance case. *Floyd v. Dunson (In re Ramirez Rodriguez)*, 209 B.R. 424, 434 (Bankr. S.D. Tex. 1997). Unless special circumstances permit, any such award should be made from the initiation of the adversary or from when payment was otherwise demanded. *Id.* The court finds that the estate is entitled to prejudgment interest in this case at the statutory rate set forth in 28 U.S.C. § 1961(a) from the date of the filing of this adversary complaint. *See id.* The estate is also entitled to postjudgment interest under 11 U.S.C. § 1961(a). *Id.*

SIGNED June 18, 2004.

ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE